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No. 85-616

In the Supreme Court of the United States

OCTOBER TERM, 1985

SHARON STEEL CORPORATION, APPELLANT

v.

THE CITY OF FAIRMONT, WEST VIRGINIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, preempts a municipal ordinance that declares the unsafe permanent disposal of hazardous wastes within the city to be a nuisance.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Appellant operated a coking plant in the City of Fairmont, West Virginia from 1948 through 1979. After closing the plant, appellant sought to construct a permanent facility at the plant site for disposing of the hazardous by-products that had accumulated there. J.S. App. 3a. In June 1983, the City passed Ordinance No. 597, which prohibits the permanent storage of wastes that "pose a substantial present or potential hazard to human health or the environment when stored." J.S. App. 38a-39a. The ordinance deems "such disposal of hazardous waste * * * a public nuisance," it authorizes the City Attorney to institute civil actions to abate such nuisances, and it provides for criminal misdemeanor penalties. *Id.* at 39a.

2. a. Appellant instituted this action against appellees, the City and City officials, in the Circuit Court of Marion County, West Virginia, seeking a declaratory judgment that the ordinance is preempted under federal and state law. On cross-motions for summary judgment, the circuit court entered judgment in appellees' favor. J.S. App. 26a-28a, 29a-31a. The circuit court stated that the ordinance "is not designed to regulate the disposal of hazardous waste" but only "to deal with a nuisance." *Id.* at 27a. Moreover, the court concluded, the effect of the ordinance would "not be far-reaching" and would not "frustrate West Virginia's comprehensive statewide regulatory scheme." *Ibid.*

b. The Supreme Court of Appeals of West Virginia affirmed. J.S. App. 1a-23a. The Supreme Court of Appeals concluded that the "effect of the ordinance is to define a public nuisance condition involving hazardous wastes." *Id.* at 7a; see also *id.* at 21a (ordinance defines a "common law nuisance"). The court made clear that "the ordinance does not completely ban hazardous waste disposal facilities, but is directed at those that pose a substantial danger to human health or the environment." *Id.* at 16a-17a. Thus, the ordinance prohibits only "the permanent storage of hazardous wastes which are *improperly* stored." *Id.* at 6a (emphasis added). The burden is on the City, the court stated, to show that any particular waste disposal site is so unreasonable as to constitute a nuisance. *Id.* at 19a, 20a. The court concluded that "the issue of whether a given site is a public nuisance is a question of fact dependent upon the circumstances existing at such site." *Id.* at 21a.

The Supreme Court of Appeals held that the ordinance, as thus interpreted, is not preempted by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, or state law. J.S. App. 11a-17a. In concluding that the ordinance does not conflict with the RCRA, the court noted that the Act contains a savings clause, 42 U.S.C. 6972(f),

which permits persons to bring actions to abate nuisances as defined under state law. J.S. App. 12a-13a. The court distinguished cases involving absolute bans on waste disposal facilities because the ordinance at issue here does not completely ban disposal sites within the City. *Id.* at 16a-17a.

DISCUSSION

Appellant argues (J.S. 7-19) that the City's ordinance constitutes an absolute prohibition of permanent hazardous waste disposal sites within the City. See, *e.g.*, J.S. 7 (ordinance "absolutely prohibit[s]" waste disposal sites); *id.* at 12 (ordinance is a "blanket local siting ban"). While a complete prohibition on placement of hazardous waste sites might in some circumstances conflict with the federal scheme set forth in the Resource Conservation and Recovery Act, that question is not presented here. The Supreme Court of Appeals has authoritatively interpreted the ordinance to prohibit only the *unsafe* disposal of hazardous wastes. J.S. App. 6a-7a, 16a-17a, 19a-21a. See, *e.g., Brown* v. *Ohio*, 432 U.S. 161, 167 (1977). Nothing in the facts of this case suggests that such a ban threatens significantly to interfere with achievement of the purposes of the RCRA. Appellants' contentions are insubstantial.

The RCRA does not expressly preempt the states from regulating hazardous waste disposal facilities. To the contrary, Congress provided that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies," 42 U.S.C. 6901(a)(4), and it expressly permitted state and local regulation of the siting of hazardous waste disposal facilities:

> Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by [federal] regulations.

42 U.S.C. 6929.[1] As this Court stated in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 620-621 n.4 (1978) (citation omitted), the RCRA does not evince a " 'clear and manifest purpose of Congress' * * * to pre-empt the entire field of interstate waste management or transportation, either by express statutory command, * * * or by implicit legislative design."[2]

This Court consistently has applied a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 7; see, *e.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In view of this presumption and Congress's clear intent to preserve for the states a significant role in the regulation of hazardous wastes, the ordinance could be invalidated under the Supremacy Clause only if it plainly " 'stands as an obstacle to the accomplishment and execution of the full

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[1]See also 42 U.S.C. 6972(f) (permitting persons to "seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste" under "any statute or common law"). Appellant erroneously argues (J.S. 17) that this provision is irrelevant because the City's ordinance does not provide for the enforcement of any hazardous waste standard. To the contrary, the ordinance establishes just such a standard by codifying the common law of nuisance and applying it to hazardous waste disposal facilities, and it expressly provides for enforcement actions to abate such nuisances. Cf. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 327-328 (1981) (suggesting role for state nuisance actions under the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*).

[2]In *City of Philadelphia*, the Court stated (437 U.S. at 620-621 n.4) that an absolute prohibition on the transportation of wastes into a state was not preempted by the RCRA (although the Court concluded that the prohibition violated the Commerce Clause (*id.* at 629)). It follows a fortiori that the partial ban only on unsafe disposal sites at issue here is not preempted.

purposes and objectives of Congress' "in the RCRA. *Hillsborough County*, slip op. 5, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Such a conflict, if it existed, would have to be "strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County*, slip op. 8.

We do not perceive any conflict here. The ordinance does not absolutely prohibit the permanent storage of hazardous wastes within the City. Rather, it reaches only disposal sites that constitute a public nuisance by virtue of improper storage of the wastes.[3] This will not necessarily interfere with the federal regulatory scheme. See *Neal* v. *Darby*, 282 S.C. 277, 284-285, 318 S.E.2d 18, 23 (App. 1984) (public nuisance action to enjoin hazardous waste disposal site not preempted by RCRA); *State* v. *Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (1982) (same).[4] The

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[3]Appellant's suggestion (J.S. 11) that the ordinance absolutely prohibits the disposal of precisely those wastes that the RCRA permits to be disposed is in error. As interpreted by the Supreme Court of Appeals, the ordinance is not a blanket prohibition but only a requirement that disposal be conducted in a safe and proper manner. The ordinance's reference (§ 1, J.S. App. 38a) to those wastes "whose disposal would require a state or federal hazardous waste permit" further limits the coverage of the ordinance. It does not convert the partial prohibition into an absolute ban.

[4]The cases on which appellant relies (J.S. 13; Reply Br. 2-3) are inapposite. All three cases involved absolute prohibitions of disposal sites rather than the banning only of unsafe sites at issue here. Moreover, *Rollins Environmental Services (FS), Inc.* v. *Parish of St. James*, 775 F.2d 627, 633-637 (5th Cir. 1985), and *Warren County* v. *State of North Carolina*, 528 F. Supp. 276, 288-290 (E.D.N.C. 1981), addressed preemption under the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*, which, in contrast to the RCRA, expressly preempts state regulation. 15 U.S.C. 2617(a)(2)(B). Finally, the court in *Rollins Environmental Services of Louisiana, Inc.* v. *Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979), struck down a local prohibition on hazardous waste disposal largely because it was not authorized under state law.

ordinance requires a case-by-case determination of the reasonableness of any particular hazardous waste disposal site. J.S. App. 21a. Such a determination has yet to be made in the context of this declaratory judgment action. Whatever the merits of a preemption claim with respect to application of the ordinance in a particular case, we believe that the ordinance, as interpreted by the Supreme Court of Appeals, plainly is valid on its face.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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